MINISTERIO DE RELACIONES EXTERIORES Y MOVILIDAD HUMANA
EMBAJADA DEL ECUADOR EN ESTADOS UNIDOS

2020 GSP Annual Product Review

(USTR-2020-0019)

HTSUS: 0603.11.00, under which *Fresh cut roses and buds* are classified

By:
The Embassy of the Republic of Ecuador in the United States,
on behalf of the Government of Ecuador

Comments on Chevron Corporation's Written Comments and Responses to USTR's Questions

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Replies to the Written Comments and Responses to Questions Made by Chevron

The Republic of Ecuador ("Ecuador") submits these comments in response to Chevron Corporation's ("Chevron") submission dated June 30, 2020, regarding the questions made by the GSP Subcommittee in attention to the 2020 Generalized System of Preferences ("GSP") Annual Product Review. On May 27, 2020, after the United States Trade Representative ("USTR") accepted for review three petitions to add fresh cut roses to the list of GSP eligible products, Chevron commented on this matter by opposing such petitions and alleging that "[a]lthough the petitions were submitted by multiple stakeholders, the principal beneficiary of the action requested would be Ecuador".[1]

Chevron's opposition is based upon the same misguided reasons it has founded its request to withdraw or suspend Ecuador's status as a GSP beneficiary country. As Ecuador has continually presented to the USTR, the country meets the statutory criteria to be a GSP beneficiary country since it has not failed to act in good faith in the recognition and enforcement of international Final Arbitral Awards.

In addition, unlike what Chevron suggests, the benefits derived from the inclusion of fresh cut roses to the list of GSP eligible products will not only benefit Ecuador. That statement ignores the existence of different petitions that were made to include fresh cut roses in the GSP, as well as the fact that denying such petitions based on Chevron's arguments will affect not only Ecuador, but other GSP beneficiary countries as well.

In this brief, Ecuador will address Chevron's responses to the questions posed by the GSP Subcommittee.

1) **The petition to add fresh cut roses would provide duty-free treatment for roses imported from all GSP-eligible countries; however, your petition focused on the benefits that Ecuador would receive. Could you explain why you exclude the possibility that other rose producing countries besides Ecuador could benefit from the addition of this product?**

The first question is aimed at understanding why Chevron excludes the possibility that other rose producing countries, besides Ecuador, could benefit from the inclusion of fresh cut roses to the GSP. In spite of recognizing in its response that including fresh cut roses "would extend preferential duty-free treatment to roses from all GSP beneficiary countries, not just Ecuador"[2], Chevron affirms that the practical effect of this measure would only benefit the Republic of Ecuador, without even considering the real effects that granting fresh cut roses duty-free treatment may have in the long term.

Ecuador would receive immediate and meaningful benefits from the inclusion of fresh cut roses to the U.S. GSP. However, the nature of these benefits does not differ from those that other countries that are currently exporting roses to the United States would also receive. The fact that the value of Ecuador rose exports is higher than those coming from other GSP

[1] Comments of Chevron Corporation Opposing: Petition to Add Certain Roses (HTSUS 06031100) to the List of Eligible Articles for the Generalized System of Preferences (GSP), May 27, 2020, ("**Chevron's Opposition Comments**"), p. 1.
[2] Comments of Chevron Corporation in Response to Public Hearing Questions Regarding: Petition to Add Certain Roses to the List of Eligible Articles for the Generalized System of Preferences (GSP), June 30, 2020, ("**Chevron's Response Comments"**), p, 1.

beneficiary countries, this does not diminish the fact that those countries will still benefit from the inclusion of fresh cut roses to the list of GSP-eligible products, both now and in the future.

It is important to point out that this inclusion will also benefit U.S. consumers, which in many cases are other productive sectors such as hotels and restaurants, who will receive a high quality product at a lower price. In the U.S. market, it is expected that consumers, wholesalers, florists, logistics companies, and local economies that depend on the income generated by the fresh cut flower markets will benefit if this petition is granted. The greater competitiveness and increased number of rose providers would assure that small florists and retailers would be able to diversify and increase their businesses.

Accepting Chevron's arguments would undoubtedly lead the USTR to ignore the benefits that the inclusion of fresh cut roses would have for other exporters, and would deprive the U.S. flower market from a clear incentive for its continuous progress and growth.

2) How would adding fresh cut roses to the GSP impact the potential resolution of your dispute with the government of Ecuador?

The second question posed by the GSP Subcommittee asks about the relation between adding fresh cut roses to the GSP and Chevron's dispute with the Republic of Ecuador. The answer to this question is that there is no direct or indirect relation. However, Chevron suggests that accepting the petition to include fresh cut roses to the GSP, when imported ***from all GSP eligible countries***, would send Ecuador a wrong "signal".

First, Chevron's argument ignores that a decision in favor of granting preferential duty-free treatment to fresh cut roses from all GSP eligible countries, will not only benefit Ecuador, regardless of Chevron's "practical" arguments. Such decision will not undermine Chevron's ability to secure Ecuador's compliance with the Second Partial Award on Track II (the "Partial Award"). In fact, if Chevron considers that Ecuador has not complied with the Partial Award, it may start enforcement proceedings before the Court that it considers to be the most appropriate one, in order to enforce the orders of the Arbitral Tribunal. Thus, Chevron's ability would not be undermined by the United States decision to include fresh cut roses to the list of GSP eligible products.

Second, upon being notified with the Partial Award on August 2018, Ecuador has adopted several measures regarding the Tribunal's Orders which have been presented to the USTR in the context of the Annual GSP Country Practices Review[3]. Among these measures, Ecuador emphasized that, despite the legal difficulties that the process involves, it has acted in good faith to address Chevron's – and the Tribunal's – concerns. Proofs of this are the communications sent to the authorities of Argentina, Brazil and Canada. The Lago Agrio plaintiffs were seeking to enforce the fraudulent Lago Agrio judgment in those countries. By sending the communications, Ecuador demonstrates that it has taken actions in order to comply with the Partial Award. Upon receiving Ecuador's communication, the Canadian Supreme Court dismissed the case presented by the Lago Agrio plaintiffs.

[3] *See* Ecuador's Pre-Hearing Brief of January 17, 2020 and Ecuador's Post-Hearing Brief of February 28, 2020.

Third, Chevron has repeatedly stated in several forums – USTR, BIT Arbitral Tribunal and Dutch Courts – that Ecuador has "publicly denounced the awards and has declared that it will not comply and that it does not recognize the awards".[4] To make this statement, Chevron makes reference to a brief posted on November 2018 where it cited instances of "Ecuador's public denunciation" of the Partial Award. In this brief, Chevron refers to: (i) Ecuador's annulment action before the Dutch Courts, and (ii) public authorities meeting with some of the representatives of the Lago Agrio plaintiffs. However, Chevron failed to mention in its brief, key rulings and statements made by the Arbitral Tribunal that have rendered Chevron's criticisms irrelevant:

- Chevron casts doubt on Ecuador's set aside proceedings in the Dutch Courts. But the Tribunal has already confirmed Ecuador's legal right to petition the Dutch courts – The Hague being the seat of arbitration – in order to set aside orders of the Track II Partial Award. As the Tribunal wrote, "*there is nothing in Paragraph 10.13(i) of the Second Partial Award that deprives the Respondent ´of its legal right to challenge the award´ under the lex loci arbitri.*"[5]

- While Chevron attempts to stigmatize Ecuador because some officials have met with representatives of the Lago Agrio plaintiffs ("LAPs"), the Tribunal has already held that exchanges between Ecuador and the Lago Agrio plaintiffs cannot be interpreted as improper collusion.[6] The Tribunal has recognized that *"it was inevitable that the Lago Agrio Litigation should arouse strong political, if not populist, passions at the highest level in Ecuador. Oil pollution and international oil companies often do. Hostile statements by politicians, practicing domestic politics, do not necessarily amount to international wrongs."*[7]

Below, Ecuador replies to each of the allegations made in Chevron's Third Pre-Hearing Brief dated November 15, 2018:[8]

- Chevron harps on comments attributed in the press to former Vice President Vicuna expressing dissatisfaction with the Partial Award. At the time, Ecuador was in the process of exercising its legal right to petition the Dutch Court to set aside parts of the Partial Award. It is clear that former Vice President Vicuna was supporting these efforts and hoped that the Dutch Court would reverse aspects of the Partial Award. The words of the former Vice President were merely domestic political statements that did not violate any aspect of the Partial Award.

- Chevron cites a press release published by the Union of People Affected by Texaco to support their conspiracy theory that the Ecuadorian Government is working with Mr. Fajardo to undermine the Track II Award. Chevron, without any proof, states that Mr. Fajardo and the Attorney General "discussed a 'roadmap' to circumvent the Track II

[4] Chevron's Response Comments, p. 5.
[5] Decision on Ecuador's Request for Interpretation under Article 35 of UNCITRAL Arbitration Rules (6 Nov. 2018) ¶ 12 (*quoting* Ecuador's Request for Interpretation (18 Sept. 2018), p.4) .
[6] Second Partial Award on Track II (30 Aug. 2018) ("Second Partial Award"), ¶ 5.238.
[7] *Id.*
[8] Third Pre-Hearing Brief (Dkt. No. USTR-2013-0013-0033), November. 15, 2018, pp. 9- 12.

Award."[9] Further, Chevron's contention that the Attorney General expressed "absolute empathy" for the Lago Agrio Plaintiffs (LAPs) and confirmed that they "could work together," presumably to undermine the Partial Award, is another falsehood.[10] To make this assertion, Chevron cites a Radio Centro interview of Attorney General Salvador.[11] They omit that, beginning in minute 24 of the interview, the Attorney General states that Ecuador will pursue the appropriate remedy provided by international law, which is a set aside action of the Track II Partial Award in The Netherlands, but emphatically clarifies that this does not mean that the Ecuadorian State assumes the defense of the indigenous communities in the Amazon. The Attorney General clarifies that the affected communities have to assert their own rights.

- Chevron attempts to suggest that actions of the Ombudsman's Office of Ecuador constitute Government assistance in the enforcement of the LAPs' judgment. But this blatantly mischaracterizes the Ombudsman's role, as shown by the very document Chevron cites. The role of the Ombudsman is one of oversight and monitoring for due process.[12] The Ombudsman's Office operates autonomously and has no authority to press for judicial enforcement in any respect.[13]

  Chevron cites an Order of Admission from the Ombudsman's Office and claims that the order "authorizes a representative of the Ombudsman's Office to appear and act in the enforcement proceedings to advance the position of the LAPs." This is false. The Order of Admission provides for only oversight of due process and notification, nothing more.[14]

- Chevron similarly mischaracterizes actions of Ecuador's Secretary of Science, Higher Education, Innovation and Technology. According to the press release cited by Chevron, the Secretary provided a grant to the International Institute of Social Studies, Universidad San Francisco de Quito, and Frente de Defensa de la Amazonia, for a collaborative project aimed at "strengthen[ing] the ability of organizations and communities in the Ecuadorian Amazon to monitor socio-environmental changes in their territories through the use of community-based monitoring systems.[15] Incredibly, Chevron insinuates that this press release is evidence of intent by the Republic of Ecuador to undermine the Tribunal's orders.

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[9] *Id.*, p. 11. This allegation was addressed before the Arbitral Tribunal. *See* Respondent's Reply to Claimants' Opposition to Interpretation (1 Nov. 2018), p. 8.
[10] *Id.*
[11] Radio Interview of Attorney General Salvador, Radio Centro (Sept. 11, 2018), *available at* http://www.juiciocrudo.com/video/entrevista-radio-centro-inigo-salvador-11-sep-2018/285,
[12] *See* 25 September 2018, Ombudsman's Order of Admission, No. 001-DPE-DPS-2018-001218-KB, p. 2- 4 ("Article 18 of the Organic Law of the Ombudsman's Office states that 'When the issue or matter of the formal complaint is submitted to court or administrative decision, the Ombudsman's Office will simply oversee that due process is being respected...")
[13] *Id.*, pp. 2-3, ¶ 8 ("Article 40 [of the Regulations on Admission and Procedure for Cases under the Jurisdiction of the Ombudsman's Office of Ecuador, issued in Resolution No. 056-DPE-CGAJ-2017] states: 'Impartiality – The oversight of due process does not authorize the Ombudsman's Office to offer an opinion about the merits of the case or to raise arguments in favor of any of the parties. It does not convert the Ombudsman's Office into a party, nor does it replace the actions of judges, administrative authorities, or attorneys, nor does it replace the actions of judges, administrative authorities, or attorneys, nor does it imply the execution of a court or administrative decision – the Ombudsman's Office may at any time visit the institutions where the legal or administrative proceeding is being heard, in order to directly verify the status of the proceeding.'").
[14] *Id.*
[15] *ISS wins grant to monitor socio-economic change in Ecuador*, International Institute of Social Studies (11 Oct. 2018) *available at* https://www.iss.nl/en/news/iss-wins-grant-monitor-socio-economic-change-ecuador

> Not only does Chevron mischaracterize those events, but it makes no effort whatsoever to show how they are inconsistent with the relief granted in the Track II Award.

Fourth, Chevron affirms that Ecuador hides behind its domestic legal framework[16]. But Ecuador does not hide; it has clearly and up front stated that it must comply with its own laws - and all international law commitments, including those under the Inter-American Convention on Human Rights. For instance, Article 25 of the IACHR *"imposes on Ecuador (as a member State) the obligation to guarantee the right of access to justice, that is, an effective judicial protection, which necessarily includes the guarantee of the enforcement of a judgment, since the absence of enforcement would render it entirely ineffective."*[17] This treaty, which itself is a source of preexisting obligations of the Republic under international law, constrains Ecuador from intervening in litigations between two private parties to deprive one of those litigants from its rights to enforce an otherwise enforceable judgment.

Likewise, the same Ecuador-U.S. BIT, which was the basis for the arbitration, states in its Article VIII that:

> *This Treaty shall not derogate from:*
>
> *(a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;*
>
> *(b) international legal obligations; or*

As a consequence, the interim awards posed a legal conundrum as they represented a conflict of law, not only between the Awards and the State's domestic law obligations, but between the Awards and Ecuador's international law obligations as codified in the Inter-American Convention of Human Rights and the Ecuador-U.S. BIT itself.

If Ecuador were to execute the Tribunal's order to render the Lago Agrio Judgment unenforceable – if this was even possible – it will result in a violation of the principle of legal certainty and *res judicata* effects of final judgements. Furthermore, if Ecuador removes the enforceability status of the Lago Agro Judgment, the Lago Agrio plaintiffs would be deprived of their fundamental right of access to a court, and the essence of this right would be impaired. The right of access to a court incorporated in Article 10 of the Universal Declaration of Human Rights ("UDHR") and Article 25 of the American Convention on Human Rights ("ACHR"), to which Ecuador is a ratifying party, also entails the right to be able to enforce a judicial decision within a reasonable time.

Yet, Ecuador had offered to engage in a good faith dialogue to accommodate Chevron's reasonable concerns. However, Chevron has not shed any light on how to comply, nor has Chevron initiated a recognition and enforcement proceeding of the Award, as required by the New York Convention. Not even Chevron's Ecuadorian counsel has suggested it as a suitable and legal way to implement the Award.

[16] Chevron's Response Comments, p. 5.
[17] Decision of the Court of Appeal of Lago Agrio (March 1, 2012), p. 2.

Fifth, since 2002, Ecuador has faced several investment treaty arbitrations. Up to date, twenty-one cases have been concluded. Among these twenty-one cases, seven arbitration procedures resulted in adverse awards against Ecuador. The Republic of Ecuador has voluntarily complied with all of the above-mentioned Final Awards. In each case, compliance was in full satisfaction of claimants. Six of these cases involved important U.S. companies. Besides Chevron, none of these companies have ever complained before the USTR claiming that Ecuador has failed to act in good faith in recognizing or enforcing Arbitral Awards in favor of U.S. corporations.

This clean record demonstrates that there is no real reason to consider that, even if this were a country specific benefit, Ecuador would fail to comply with the Final Award that will be issued within the arbitration in the following months. Ecuador has not failed to comply with arbitrations before this petition, and it will not fail to do so in the future.

Besides, Chevron should not worry about efforts to resolve the dispute being undermined, since the development of the arbitration is going according to the procedural calendar set by the Arbitral Tribunal in April 2019. Consequently, the resolution of the dispute does not depend on the inclusion of roses to the list of GSP eligible products, but on the Tribunal's final decision on Track III.

For the abovementioned reasons, Ecuador respectfully requests the GSP Subcommittee to ignore Chevron's opposition to the petition made to the Office of the U.S. Trade Representative to include fresh cut roses (classified under Harmonized Tariff Schedule subheading 0603.11.00) to the list of GSP eligible products.